IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-482

STATE OF MICHIGAN,

vs

THOMAS W. TUCKER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court was filed on June 21, 1973, and is not reported. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 22, 1972, and is reported at 352 F Supp 266 (ED Mich, 1972). The opinion of the Supreme Court of the State of Michigan was filed on August 27, 1971, and

is reported at 385 Mich 594; 189 NW 2d 290 (1971). The opinion of the Michigan Court of Appeals was filed on October 1, 1969, and is reported at 19 Mich App 320, 172 NW 2d 712 (1969). Copies of all four opinions of the lower courts are included in the printed Appendix to the Petition For A Writ Of Certiorari filed in this cause with this Court on September 14, 1973.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The petition for a writ of certiorari was timely filed on September 14, 1973, and was granted on December 3, 1973. The jurisdiction of this Court rests on 28 USC, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether the testimony of a witness is inadmissible under the "Poisonous Fruits" doctrine when that witness' identity was discovered through a proper pre-*Miranda* interrogation of the defendant which did not meet the standards subsequently set forth in *Miranda* v *Arizona*, 384 US 436 (1966)?

II.

Whether the standards set forth in *Miranda* v *Arizona*, 384 US 436 (1966) are too restrictive in their exclusion of confessions and are not mandated by the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this cause are as follows:

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On April 19, 1966, Miss Marion Corey was found tied, gagged and partially disrobed in her Pontiac Township home by a friend and co-worker, Luther White (R 44-46). Miss Corey, a 43-year-old lady who lived alone and was a virgin, had been severely beaten and was incoherent. She has never been able to recall what happened to her and has never identified the defendant or anyone else as her assailant.

When Mr. White arrived, he discovered a dog inside Miss Corey's house (R 60-62), though she did not own one herself (R 66). Police followed the dog, Sugarfoot, to the defendant's house where it curled up on the porch. Questioning of neighbors by police revealed that the dog belonged to the defendant who lived in that house (R 102-108). Defendant was located later that day and picked up by the police.

When the defendant was taken to police headquarters, scratches were observed on his face (R 175) and blood was found on his clothes and undershorts (R 197-199). He told police that the scratches and blood were caused by a goose he had killed.

Prior to interrogating the defendant on April 19, 1966, the police advised him that he had the right to remain silent and the right to contact a lawyer (Pre Exam, R 94-100). He was not advised of any right to a court-appointed attorney. Defendant agreed to talk with the police and told them that at the time of the crime he was with a friend, one Robert Henderson.

The police contacted Henderson in an attempt to confirm the defendant's alibi. Henderson not only refuted the alibi,

but also related certain incriminating statements made in his presence by the defendant.

Miranda v *Arizona,* 384 US 436 (1966) was decided by this Court on June 13, 1966. Defendant's trial commenced after that date on October 18, 1966. As a result, the statements made by the defendant to police were excluded as being in violation of *Miranda, supra.* Henderson, however, did testify as a witness for the prosecution. Henderson stated that the defendant arrived at his house on the day of the crime at about 1:00 p.m., while he, Henderson, was cleaning a goose he had shot (R 217-218). Henderson asked the defendant what had happened to his face and whether he had got ahold of "a wild one or something." The defendant replied "something like that" (R 223). After a few minutes Henderson asked "who it was" and the defendant replied "She's a widow woman" who was in her thirties and lived the next block over (R 224-225). It was stipulated to by the Prosecution that knowledge of Henderson was obtained through the statements made to the police by the defendant.

The defendant was convicted of rape by the jury and was sentenced to a term of 20 to 40 years imprsonment. In unanimous opinions included in the Appendix to the printed petition for a writ of certiorari, the Michigan Court of Appeals and the Michigan Supreme Court affirmed the defendant's conviction. The United States District Court, Eastern District of Michigan, granted the defendant's petition for a writ of habeas corpus stating that Henderson's testimony had been wrongly admitted into evidence at trial. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court. The decisions of both federal courts are also included in the Appendix to the petition for a writ of certiorari. This Court granted the petition for a writ of certiorari on December 3, 1973.

SUMMARY OF ARGUMENT

The case of *Miranda* v *Arizona*, 384 US 436 (1966) should not apply to the instant case, as the interrogation of the present defendant occurred prior to the decision date of *Miranda, supra.* This Court should modify *Johnson* v *New Jersey,* 384 US 719 (1966), and adopt an "activity date" rule concerning the retroactive effect of *Miranda, supra,* as opposed to the present "trial date" rule. The date of the interrogation should be the determining factor, as police conduct prior to the decision date of *Miranda, supra,* cannot now be deterred by applying the standards of that case to a trial which commenced after *Miranda, supra,* was decided.

The testimony of a crucial prosecution witness should not be excluded from evidence because his identity was learned as a result of an allegedly involuntary statement made by the defendant. While physical evidence speaks for itself and is excluded as a "poisonous fruit," the trial testimony of an independent witness is subject to all the rigors of cross-examination as any other witness and need not be excluded. The manner in which a witness' identity is learned may go to the weight to be given to his testimony, but it should not affect the admissibility of that testimony. This is particularly true in the instant case as the defendant gave the witness' name to the police as a person who would substantiate his alibi. To exclude this witness' testimony deprives the trier of fact of crucial information, and yet serves no other rational purpose.

The statements made by the defendant in this case were voluntary even though he was not advised of his right to court appointed counsel. The rule of law concerning the

admissibility of confessions set forth in *Miranda, supra,* is too restrictive and is not required by the United States Constitution. A better rule of law would be for the trial court to examine all the attendant circumstances when determining if a confession was voluntarily given. The presence or absence of any single relevant factor should not mandate a decision in favor of either the prosecution or the defendant. Under such a rule of law, the present defendant's statement clearly was voluntary and therefore the manner in which the identity of one witness for the prosecution was obtained should not even be called into question. This Court should now adopt a rule of law concerning the admissibility of confessions which fairly protects the rights of the individual and our society as a whole.

ARGUMENT

I.

THE TESTIMONY OF A WITNESS SHOULD NOT BE INADMISSIBLE UNDER THE "POISONOUS FRUITS" DOCTRINE WHEN THAT WITNESS' IDENTITY WAS DISCOVERED THROUGH A PROPER PRE-MIRANDA INTERROGATION OF THE DEFENDANT WHICH DID NOT MEET THE STANDARDS SUBSEQUENTLY SET FORTH IN MIRANDA v ARIZONA, 384 US 436 (1966).

The initial question which this Court should consider in this cause is whether the warnings set forth in *Miranda* v *Arizona,* 384 US 436 (1966) should even be applicable to this defendant. The crime of which defendant Tucker was convicted occurred on April 19, 1966. The interrogation of the defendant also occurred on that same date, April 19, 1966. *Miranda, supra,* was decided subsequently on June 13, 1966. The defendant's trial commenced on

October 18, 1966. In applying the *Miranda* warnings to this case, the United States District Court relied upon *Johnson* v *New Jersey,* 384 US 719 (1966), which was decided by this Court one week after the *Miranda* decision. In *Johnson, supra,* this Court concluded that *Escobedo* v *Illinois,* 378 US 478 (1964) and *Miranda, supra,* would not be applied retroactively. Instead, the Court ruled that those two decisions would apply to all cases in which trial commenced subsequent to the decision dates of those causes.

Petitioner urges this Court to reconsider and modify its ruling in *Johnson, supra.* A more rational approach to this issue would be to apply *Miranda, supra* and *Escobedo, supra,* only to those cases in which the interrogations took place after the dates of decision in those two causes. Such an "activity date" rule as opposed to the present "trial date" rule would be totally consistent with the posture this Court has taken in other cases dealing with the question of retroactivity.

In *Desist* v *United States,* 394 US 244, 249 (1969), this Court set forth three factors to consider when determining whether or not a new rule of law should be applied retroactively. Those factors are: a) the purpose to be served by the new standard; b) the extent of reliance by law enforcement authorities on the old standards; and c) the effect on the administration of justice caused by a retroactive application of the new standard. This Court's rulings in *Escobedo, supra,* and *Miranda, supra,* did not pertain to the reliability of confessions, but rather were directed at preventing future acts of misconduct on the part of police officials. The Court therefore quite logically concluded in *Johnson, supra,* that no purpose would be served by setting aside past convictions, since only future acts of misconduct could be deterred. The Court also noted in

Johnson, supra, that law enforcement officials had fairly relied upon the decisions of this Court prior to *Escobedo, supra,* and *Miranda, supra,* and that to apply those two decisions retroactively would seriously disrupt the administration of criminal justice. *Johnson* v *New Jersey, supra,* 731. This same logic would seem to indicate that the date of the interrogation, not the date of the trial, is the key factor in any retroactive application of the new standards. Police conduct that occurred prior to the decision date in *Miranda, supra,* which this Court deems improper, cannot now be deterred by applying the standards of that case to a trial which commenced after *Miranda, supra* was decided.

The "activity date" rule has been adopted by this Court in other cases dealing with the retroactive application of new standards in criminal procedure. In *Stovall* v *Denno,* 388 US 293, 300-301 (1967), this Court chose to apply the new standards set forth in *United States* v *Wade,* 388 US 218 (1967) and *Gilbert* v *California,* 388 US 263 (1967), only to cases in which the confrontation occurred after the dates of decision in those two cases. The Court followed the same approach in *Desist* v *United States, supra,* 253, when it held that the standards set forth in *Katz* v *United States,* 389 US 347 (1967) applied only to those wiretaps occurring after the decision date of that case. Most recently in *Williams* v *United States,* 401 US 646 (1971), this Court held that the standards promulgated in *Chimel* v *California,* 395 US 752 (1969) would be applicable only to searches conducted after the decision date of that case. The fact that this Court held in *Jenkins* v *Delaware,* 395 US 213, 218 (1969) that the *Miranda* standards would not be applicable to retrials tried after the decision date of *Miranda, supra,* also seems to suggest an "activity date" rule would be more appropriate.

In the instant case, the defendant Tucker was advised prior to his interrogation that he had the right to remain silent and the right to contact a lawyer. Such a warning was in complete compliance with the standards then in effect. To now apply the standards set forth in *Miranda, supra,* is senseless. Such application cannot deter the "misconduct" by the police which has already occurred. Furthermore, it would seem unfair to condemn as improper the activities of the police in this case when they were acting in accordance with the standards then in effect. Neither the rights of the defendant nor the effective administration of criminal justice are assisted by such an application. Petitioner therefore requests that this Court modify *Johnson* v *New Jersey, supra,* in such a manner so as to make *Escobedo, supra,* and *Miranda, supra,* applicable only to cases in which the improper activity of the police took place after the decision dates of those two cases. Under such an "activity date" rule, defendant Tucker has no right to object to the testimony used against him at his trial.

The next important question for this Court to consider in this cause is whether the "poisonous fruits" doctrine should apply to the testimony of a witness whose identity is discovered as a result of improper police conduct. As stated above, the Petitioner does not believe that the police officers' conduct in this case was improper. Even it it were, however, it does not follow that the witness Henderson's testimony should be excluded.

The prime case cited and relied upon by the United States Court of Appeals was *Wong Sun* v *United States,* 371 US 471 (1963). In that case, incriminating statements made by the defendants themselves and physical evidence, narcotics, were admitted during the defendants' trial. This Court ruled that the statements and drugs should have

been excluded as the "poisonous fruits" of illegal arrests. In the present case, the evidence which the Court of Appeals held to be wrongly admitted was the testimony of an independent witness. No statements made by the defendant were used agaist him, nor was any physical evidence obtained as a result of his interrogation. As noted in footnote nine of *Harrison* v *United States,* 392 US 219, 223 (1968), this Court has yet to consider this issue of whether the testimony of an independent witness must be excluded as the fruit of the poisoned tree.

Presented with this question of first impression, Petitioner urges this Court to adopt a rule of law allowing the testimony of such an independent witness to be used against a defendant. Though lower courts have resolved this issue in varying manners, the best reasoned opinions were written by Chief Justice Burger in *Smith* v *United States,* 324 F2d 879 (DC Cir, 1963) and *Brown* v *United States,* 375 F2d 310 (DC Cir, 1967), when he was a judge in the United States Court of Appeals, District of Columbia Circuit.

In *Smith, supra,* the identity of a crucial witness was learned as a result of the illegal detention and interrogation of the defendant. The Court of Appeals held that the witness' testimony was admissible at the defendant's trial. Writing the majority opinion, Chief Justice Burger stated:

> "Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of

> inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of his human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." (Footnotes omitted). *Smith* v *United States, supra,* at p 881.

The exact same statement is true of the instant case. Henderson's eyewitness testimony was subject to full and complete cross-examination by defense counsel. The manner in which Henderson's identity was learned may go to the weight to be given to his testimony, but it should not affect the admissibility of that testimony.

This approach was reaffirmed by Chief Justice Burger in his concurring opinion in *Brown* v *United States,* 375 F2d 310 (DC Cir, 1967). The Chief Justice stated:

> "The critical aspect of *Smith-Bowden* is that live witnesses are not 'suppressed', as inanimate objects may be. When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. *How he came to be in court is a matter which goes only to the weight, not the admissibility, of his testimony.*" (Emphasis supplied). *Brown* v *United States, supra,* at p. 319.

While physical evidence "speaks for itself," the testimony of an independent eyewitness obtained through an interrogation of the defendant is subject to all the rigors of

cross-examination as that of any other witness. Because of that distinction, the testimony of such a witness should be held admissible.

In the instant case, it is particularly unfair to exclude Henderson's testimony in order to deter the "misconduct" of the police officers. Defendant Tucker told the police that Henderson would substantiate Tucker's own story about the manner in which he received the scratches which were on his face at the time of his arrest. As a result of Tucker's exculpatory statements, the police contacted Henderson in an effort to determine if Tucker might in fact be innocent. Henderson's statement, however, unequivocally refuted Tucker's explanation, and also revealed other incriminating statements made by Tucker to Henderson. To exclude Henderson's testimony to deter the police officers' conduct makes no sense whatsoever, since the officers were attempting to substantiate the defendant's own statement when they contacted the witness whose name was given to them by the defendant. The officers would have been derelict in their duties had they not interviewed Henderson.

This Court must determine whether any rational purpose is served by excluding the testimony of an eyewitness as a "poisonous fruit." Petitioner submits that logic requires that an animate individual who can supply crucial information to a trier of fact should be allowed to do so. Any other rule of law deprives the trier of fact of being fully informed, yet accomplishes no other rational goal.

II.

THE STANDARDS SET FORTH IN MIRANDA v ARIZONA, 384 US 436 (1966) ARE TOO RESTRICTIVE IN THEIR EXCLUSION OF CONFESSIONS AND ARE NOT MANDATED BY THE UNITED STATES CONSTITUTION.

The broad question of the necessity for the specific warnings set forth by this Court in *Miranda, supra,* is also raised in the instant case. If the police officers' interrogation of defendant Tucker is held to be legal despite the absence of one aspect of the *Miranda* warnings, then there is no reason whatsoever to exclude the testimony of witness Henderson, and the defendant's conviction should be affirmed.

The foundation for this Court's ruling in *Miranda, supra,* was that portion of the Fifth Amendment of the United States Constitution which states that no person ". . . shall be compelled in any criminal case to be a witness against himself . . ." This Court has interpreted that language as requiring the exclusion from evidence of any coerced statements obtained from a defendant. The problem lies with the establishment of a fair test to determine whether or not a defendant's statements are the result of coercion. Petitioner respectfully submits that the test set forth in *Miranda, supra,* is not a fair one for law enforcement officials.

Prior to *Miranda, supra,* this Court used more flexible standards in determining whether or not a defendant's statements were involuntary, and therefore resulted in his being compelled to testify against himself. This Court had specifically held that a confession need not be excluded simply because a defendant had not first been advised of his right to counsel, or that anything he said would be

used against him. *Wilson* v *United States,* 162 US 613, 624 (1895). The general test for voluntariness immediately prior to *Miranda, supra,* seems best set forth in Justice Goldberg's majority opinion in *Haynes* v *Washington,* 373 US 503 (1963). Justice Goldberg stated:

> "We have only recently held again that a confession obtained by police through the use of threats is violative of due process and that the question in each case is whether the defendant's will was overborne at the time he confessed, *Lynumn* v *Illinois,* 372 US 528, 534, 9 L ed 2d 922, 926, 83 S Ct 917. In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort. *Wilson* v *United States,* 162 US 613, 623, 40 L ed 1090, 1096, 16 S Ct 895. See also *Bram* v *United States,* 168 US 532, 42 L ed 568, 18 S Ct 183. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances. See, e.g., *Leyra* v *Denno,* 347 US 556, 558, 98 L ed 948, 950, 74 S Ct 716." (Footnotes omitted.) *Haynes* v *Washington, supra,* at 513-514.

It is noteworthy that the Court's decision in excluding the defendant's confession in *Haynes, supra,* was based upon a violation of the Due Process Clause of the Fourteenth Amendment. Under the approach set forth in *Haynes, supra,* a court examines "all of the attendant circumstances" and then makes a determination as to "whether the confession was obtained by coercion or improper inducement." Petitioner submits that this approach is more reasonable and workable than the rule of law laid down in *Miranda, supra.*

The majority opinion in *Miranda, supra,* was joined in by five Justices, while the remaining four Justices dissented in three different opinions. Petitioner urges that the rationale contained in the *Miranda* dissents is well-reasoned, and should be adopted as the majority position of this Court. As pointed out by the dissenters, there is no magical language in the Fifth Amendment which requires that the warnings set forth in *Miranda, supra,* be given prior to any interrogation of a defendant. In *Miranda, supra,* a thin majority of this Court made new law and public policy through its interpretation of the Fifth Amendment. Petitioner does not dispute this Court's right to announce such new law. Petitioner does submit, however, that the passage of time since *Miranda, supra,* was decided has illustrated that the rule of law announced in that case is not the best possible one, and that the administration of justice would be served by a modification of that interpretation.

This Court is well aware of the myriad cases which have probed and interpreted every minute aspect of the *Miranda* warnings. Citation of all those cases would serve no reasonable purpose in this brief. Suffice it to say that today, seven years after *Miranda, supra,* a trial judge still cannot rule upon the admissibility of a confession with any degree of confidence that his decision will withstand appellate attack. Furthermore, the mere giving of the warnings in and of itself does not guarantee that a confession has not been compelled. Numerous other factors can also contribute to an atmosphere of coercion which results in an involuntary confession. For that very reason, all the attendant circumstances should be examined by the trial court. Only after such a complete examination is the trial court properly qualified to determine whether or not a defendant's statements were involuntarily extract-

ed from him. The presence or absence of any single relevant factor should not result in a conclusive decision in favor of either the prosecution or the defendant.

The approach set forth by Petitioner is basically that adopted by the Congress of the United States in the Omnibus Crime Control and Safe Streets Act of 1968. The portion of that act dealing with the admissibility of confessions is contained in 18 USC §3501 and states:

"§3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such

defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of cousel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of

transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Added Pub L 90-351, Title II, §701(a), June 19, 1968, 82 Stat 210, and amended Pub L 90-578, Title III, §301(a) (3), Oct. 17, 1968, 82 Stat 1115."

Though by its own terms 18 USC §3501 applies only to federal prosecutions, the intent of Congress clearly was to supply a reasonable and workable rule of law as an alternative to the restrictive rule of law set forth in *Miranda, supra.* Petitioner submits that 18 USC §3501 is in compliance with both the Fifth and Fourteenth Amendments, and represents a feasible approach in this problem area of criminal law and procedure.

This Court has already indicated a willingness to allow statements made by a defendant to be admitted into evidence under some circumstances when proper *Miranda* warnings have not been given. In *Harris* v *New York,* 401 US 222 (1970), the defendant made incriminating statements to police officers after his arrest and before he was advised of his right to appointed counsel. Though the statements were not introduced in the prosecutor's case in chief, they were used for impeachment purposes after the defendant

had testified in his own behalf. This Court held that such use of the statements was proper for the purpose of impeaching the defendant's credibility. The Court noted that the statements were neither coerced nor involuntarily. Under such circumstances, it would seem proper to admit the statements in the prosecution's case in chief as well. The determining factor should be whether the statements are voluntarily made, not whether some technical warning was given.

The only factor that led the United States District Court to conclude that defendant Tucker's statements were "involuntary" was the fact that he had not been advised of his right to court appointed counsel. There is no allegation that the defendant was either physically or verbally abused in any manner. His statements, on their face, were not even incriminating, but rather were exculpatory. The statements harmed the defendant only in that they led the police officers to another individual who, much to the defendant's chagrin, testified truthfully. Under these circumstances the defendant's initial statement to the officers should be deemed voluntary, and the manner in which the police became aware of witness Henderson should not be open to question. Such a ruling would bar any application of the "poisonous fruits" doctrine to this case.

Petitioner feels some need to assure this Court that the approach suggested in this brief would not result in a rash of improper police activity for the purpose of obtaining confessions. The vast majority of law enforcement officials throughout this country conscientiously attempt to follow the law themselves. The *Miranda* warnings will continue to be given as one means of illustrating to trial courts that a defendant's confession was voluntarily made. The

approach suggested by Petitioner simply means that in a case such as the instant one, the content of the voluntary statements of a professional felon will not be excluded from evidence due to a technical defect in the warnings given. The time has come as urged by Justice Stewart in his dissent in *Mathis* v *United States,* 391 US 1, 6 (1968) to reconsider *Miranda, supra,* and adopt a rule of law fully in accord with the United States Constitution which properly protects the rights of both the individual and our society as a whole.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision in this cause of the United States Court of Appeals, Sixth Circuit, be reversed, and that the Respondent's conviction be affirmed.

Respectfully submitted,

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